

No. 84-310

Office - Supreme Court, U.S.

FILED

APR 1 1985

ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

ROSS H. SIDNEY
PATRICK J. McNULTY
P. O. Box 10434
2222 Grand Avenue
Des Moines, Iowa 50306
(515) 245-4300

JOHN J. GREER*
RICHARD J. BARRY
Professional Building
Spencer, Iowa 51301
(712) 262-1150

*Attorneys for the United States Court of Appeals
For the Eighth Circuit*

*Counsel of Record

E. L. M.

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES	II
PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. PETITIONER'S RIGHT TO FREE SPEECH HAS NOT BEEN VIOLATED	5
A. Petitioner Was Properly Suspended for His Disrespectful Refusal to Comply With the Applicable Guidelines Under the Criminal Justice Act	6
B. Rule 46 of the Federal Rules of Appellate Procedure Is Constitutional	15
II. PETITIONER'S DUE PROCESS RIGHTS WERE FULLY COMPLIED WITH BY THE EIGHTH CIRCUIT COURT OF APPEALS	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Bridges v. California</i> , 314 U.S. 252, 263 (1941)	6, 10
<i>Craig v. Harney</i> , 331 U.S. 367 (1947)	6
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773, 792 (1975)	11
<i>Holt v. Virginia</i> , 381 U.S. 131, 136 (1965)	12
<i>In re Bithoney</i> , 486 F.2d 319, 323-25 (1st Cir. 1973)	16
<i>In re Hinds</i> , 90 N.J. 604, 449 A.2d 483, 489 (1982)	11
<i>In re Sawyer</i> , 360 U.S. 622, 646, 666 (1959)	7, 12
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829, 842-43 (1978)	10
<i>Mullane v. Central Hanover Trust Company</i> , 339 U.S. 306, 314-15 (1950)	16-17
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156, 162 (1972)	16
<i>Pennekamp v. Florida</i> , 328 U.S. 331 (1946)	6
<i>Procunier v. Martinez</i> , 416 U.S. 396, 407, 413 (1974)	10, 11
<i>Sheppard v. Maxwell</i> , 384 U.S. 333, 363 (1966)	12
<i>United States v. Covern</i> , 662 F.2d 162, 168 (2nd Cir. 1981), cert. denied, 456 U.S. 916 (1982)	20
<i>United States v. Lawson</i> , 600 F.2d 215, 218 (9th Cir. 1979)	19
<i>United States v. Patrick</i> , 542 F.2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977)	20
<i>United States v. Tijerina</i> , 412 F.2d 661, 666 (10th Cir. 1969), cert. denied, 396 U.S. 990	12
<i>Wood v. Georgia</i> , 370 U.S. 375, 383 (1962)	11

Constitutional Provisions

United States Constitution, Amendment I	passim
---	--------

Statutes

Criminal Justice Act, 18 U.S.C. §3006A (1982)	passim
28 U.S.C. §455	19, 20

Other Authorities

Rule 33.7, Supreme Court Rules	10
Rule 34.2, Supreme Court Rules	2
Rule 46(c), Federal Rules of Appellate Procedure	5, 15, 16
<i>Guidelines for the Administration of the Criminal Jus- tice Act</i> , ch. 2, §3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures	1

No. 84-310

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

**PROVISIONS OF CONSTITUTION, STATUTES
AND RULES INVOLVED**

In addition to the First and Fifth Amendments to the United States Constitution cited by petitioner (see Petitioner's Brief 1), the United States Court of Appeals for the Eighth Circuit believes the following statutes and regulations are involved.

1. 18 U.S.C. §3006A(d) (1-4) (1982).
2. *Guidelines for the Administration of the Criminal Justice Act*, ch. 2, §3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures.

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Rules of the Supreme Court, this Statement of the Case is submitted to correct material omissions and inaccuracies in the Statement set forth in petitioner's brief. It is uncontroverted that petitioner's claim for compensation and reimbursement submitted to Chief Judge Lay pursuant to 18 U.S.C. §3006A(d) of the Criminal Justice Act did not comply with the applicable guidelines. In his initial submission, petitioner failed to attach a detailed memorandum detailing and justifying his legal services.¹ Petitioner's voucher was returned with a request that he provide more information. (J.A. 2.) Petitioner responded to the request for further information by writing a letter dated September 20 to which he attached billing records. (J.A. 3.) As his handwritten note on his September 20 letter indicates, the amounts listed on his billing records do not correspond with the hourly rates provided by the Criminal Justice Act. Neither did the billing disclose the actual hours spent by petitioner in the rendering of legal services nor an itemized list of his long distance phone calls. On September 26, 1983, June Boadwine, administrative assistant to Chief Judge Lay, returned petitioner's voucher and billing records due to his non-compliance. (J.A. 13.) After thus failing twice to comply with the applicable guidelines, petitioner wrote his letter of October 6, 1983. (J.A. 14-15.) Although addressed to the secretary of the district court, petitioner states in the first paragraph of his letter that he is in receipt of the letter from the Court of Appeals

1. Petitioner had requested \$1,898.55 for compensation and reimbursement. (J.A. 1.) Judge Van Sickle had approved payment in the amount of \$1,796.05. (J.A. 1.) Amounts claimed in excess of \$1,000 must be approved by the chief judge of the circuit. 18 U.S.C. §3006A(d)(3) (1982).

of September 26, 1983, and that he is writing for the purpose of responding to that letter.

Petitioner fails to point out in his Statement of the Case that Chief Judge Lay, in his letter of November 3, 1983, to Judge Van Sickle—of which petitioner received a copy—wrote as follows: "Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the *apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it.*" (J.A. 16.) (Emphasis added.) On November 15, 1983, Chief Judge Lay wrote Judge Van Sickle again and indicated, *inter alia*, that if Mr. Snyder wishes to write the Court and offer his apology to the Court for his disrespectful comments, he would be willing to recommend to the Court that an order to show cause not be filed. (J.A. 19.) On December 12, 1983, Judge Van Sickle informed Chief Judge Lay that Mr. Snyder had decided not to apologize. (J.A. 20.) Subsequently, on December 22, an Order to Show Cause was filed. (J.A. 21-23.) In the show cause order, Chief Judge Lay, on behalf of the Court, notes that Mr. Snyder has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorney fees in addition to refusing to represent criminal indigent defendants. In view of these refusals "to carry out his obligations as a practicing lawyer and as an officer of this court," petitioner was ordered to show cause why he should not be suspended from the federal courts of the Eighth Circuit for such period of time as his refusal to serve continues. (J.A. 22.)

Petitioner prepared a Return to the Order to Show Cause which was filed on January 16, 1984. (J.A. 23-31.) Petitioner does not mention in his Statement of the Case

that he acknowledged in his Return that the present proceeding was initiated by the letter of October 6, 1983, and that had the letter not been sent, this proceeding would not be taking place.

The hearing on the Order to Show Cause was held on February 16, 1984. Petitioner was given an opportunity at the hearing to apologize for his October 6 letter. He refused to do so and added: "If I am suspended I can tell you that the situation in Bismarck will become worse than it already is, because I don't think you are going to find anybody that will take a case." (J.A. 44.)

In his Statement, petitioner argues that certain comments made by the Court at the show cause hearing support his position that he was not given proper notice of the grounds for his suspension. (Petitioner's Brief 7-13.) The Eighth Circuit disputes the contention that petitioner was not given proper notice and addresses it in the body of its brief.

On February 24, 1984, Chief Judge Lay wrote petitioner giving him yet another opportunity to apologize. (J.A. 52-53.) Petitioner responded by letter dated February 27 and indicated that he would never apologize, invited the Court to do whatever it felt it had to do, and intimated that he would accept the consequences of whatever the Court's actions would be. (J.A. 53-54.)

SUMMARY OF ARGUMENT

Petitioner was disciplined for his disrespectful refusal to comply with the relevant guidelines for the judicial administration of the Criminal Justice Act. Such refusal was tantamount to disobeying a court order and directly interfered with the Court's ability to carry out its duties and to administer justice.

Petitioner had proper notice that the Court of Appeals was concerned about his disrespectful and defiant refusal to comply with the applicable guidelines. Petitioner has acknowledged this fact in his brief (p. 40) and in his Return to the Order to Show Cause. (J.A. 25.) In any event, the adamant refusal of petitioner to apologize renders any remand for hearing pointless.

ARGUMENT

I. PETITIONER'S RIGHT TO FREE SPEECH HAS NOT BEEN VIOLATED.

The first question presented for review is whether the Eighth Circuit Court of Appeals has violated petitioner's First Amendment rights. Petitioner advances two arguments: 1) that he has been denied his right to free expression and 2) that Rule 46(c) of the Federal Rules of Appellate Procedure is unconstitutionally overbroad and vague. Both arguments advanced by petitioner are without merit as he has mischaracterized and ignored the true basis for his suspension.

A. Petitioner Was Properly Suspended for His Disrespectful Refusal to Comply With the Applicable Guidelines Under the Criminal Justice Act.

Petitioner claims that the imposition of a six-month suspension by the Eighth Circuit Court of Appeals has impermissibly circumscribed his right to free speech. Characterizing his statements in the October 6 letter as criticism of the judicial system, petitioner argues that the comments do not constitute a clear and present danger to the administration of justice. (Petitioner's Brief 22, 34-35.) Petitioner's arguments fail because his underlying assumption—that he was disciplined for criticism of the judiciary and the judicial system—is not true. The Eighth Circuit Court of Appeals would be the first to admit and, indeed, champion the constitutional right of any individual to criticize the judicial system, the judiciary, and the state of the law. There is no question that such cases as *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), protect the truthful criticism of the judiciary and judicial system absent a clear and imminent threat to the fair administration of justice. But such criticism is not involved here. Petitioner was disciplined for his disrespectful refusal, after request by the Court of Appeals, to comply with regulations concerning the payment of attorney fees and reimbursement of expenses under the Criminal Justice Act. As the Court of Appeals stated in its opinion filed on April 13, 1984:

An integral part of Snyder's refusal to comply with CJA guidelines was his explicit statement of disrespect to the federal court. . . Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. *This is not to say that courts cannot and should not be sub-*

*ject to proper criticism and comment; however, when an attorney becomes disrespectful in response to a court's request that counsel comply with a congressional mandate, then we deal with a different matter. Without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA [the court's request for verification] contumacious conduct.*²

(Emphasis added.)

The judges of the Eighth Circuit have consistently maintained that petitioner's suspension was based upon his defiant and disrespectful refusal to comply with the law. In fact, petitioner was given three different opportunities to purge himself of his defiant refusal. This is the first case in the Eighth Circuit's history where an attorney has refused to comply with the request of the Court that hours and expenses be verified. (J.A. 39.) Petitioner would have this Court dispose of this matter based only on "general observations about freedom of speech." *In re Sawyer*, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting). Of course, "[t]ime, place and circumstances determine the constitutional protection of utterance." *Id.*

When petitioner first applied for attorney fees and expenses, he failed to send any verification. He then responded to the Court's request for more information by

2. Petitioner was neither cited nor disciplined for his comments that he had to go through extreme gymnastics to receive the puny amounts the federal courts authorize for work performed under the Criminal Justice Act. Although those comments could properly be characterized as criticism of the law and the judicial system, petitioner did not limit his letter of October 6 to "mere criticism." Nor was petitioner disciplined for his failure to apologize, as petitioner claims. (Petitioner's Brief 19-20.) Rather, an apology by petitioner would have obviated the need for discipline. (See letter of Chief Judge Lay dated November 15, 1983, J.A. 18-19.)

filing money charges based on his office money code. The money code, as petitioner concedes, did not verify his hours expended and did not correspond with the statutory fees allowed under the Criminal Justice Act. The Court of Appeals once again returned this application to the district court with the request that petitioner verify his actual hours and expenses. Petitioner's response may be viewed as being critical of the Court; however, the Eighth Circuit has always viewed the letter as a defiant and disrespectful refusal to comply with the chief judge's request. The disrespect and defiance is contained in three phrases: 1) "I have simply had it" (for being asked twice to comply with the guidelines); 2) "I am extremely disgusted by the treatment of us by the Eighth Circuit in this case," (for being asked to comply with the law and verify his hours and expenses); and 3) "... I am not sending you anything else. You can take it or leave it," (his defiant refusal to comply). His suspension was based on that defiant refusal.³ As the Eighth Circuit panel's opinion of April 13 observed, petitioner's defiant response was an integral part of his refusal to comply with the rules and regulations as requested by the Court. Petitioner's claim that the Eighth Circuit is penalizing all disrespectful speech (J.A. 26) simply ignores the Order to Show Cause and the basis for the imposition of discipline.

Petitioner's characterization that his letter was private is similarly misplaced. Surely, petitioner's response

3. Petitioner's refusal to provide further service under the Criminal Justice Act was not the cause for suspension. Petitioner said he would volunteer to serve under the Criminal Justice Act if other lawyers were required to serve as well. (J.A. 30, 35.) Although Snyder urges that his time had been unfairly taken by representing indigents under the Criminal Justice Act, eight of the twelve cases he handled from January 1, 1979, to early 1984 did not involve a trial. (J.A. 89.) In that five-year time period, he had devoted 270 hours of service under the Criminal Justice Act. (J.A. 89.)

to the Court, although mailed to the district court secretary, cannot be considered private mail. The Court made its request through the district court, the district court acted through the judge's secretary, and the district court relayed the request of the Court of Appeals to petitioner. His letter of October 6, as petitioner admits in the letter, was in direct response to the Court's request.

Petitioner attempts to obviate the true reason for his suspension by arguing that the Court could not possibly have suspended him for failing to provide proper support for his fees because the Court denied his claim for excess attorney fees and unitemized expenses. (Petitioner's Brief 19.) This is plainly not the case. The denial of excess fees and expenses did not purge Snyder of his defiant and disrespectful action. The following hypothetical illustrates this point. Assume an appellate court has a rule that limits briefs to 50 printed pages. The party files an appellate brief of 100 pages. The Court rejects the brief and requests the attorney to file a brief in accord with the rule. The attorney writes back and says:

The rule is ridiculous. I have simply had it. I am extremely disgusted with the treatment of me by the Court. I am not sending you anything else. You can take it or leave it.

The Court strikes the brief. It also requests the attorney to show cause why he should not be suspended for his disrespectful defiance in refusing to adhere to the Court's request that he comply with the rule. After hearing the Court requests that the attorney issue an apology for his disrespectful letter in refusing to comply with the rule. He refuses, and the Court suspends him. Clearly, the fact that the Court strikes the attorney's brief does not immunize the attorney from being sanctioned for his dis-

respectful defiance expressed in the letter. See e.g., Sup. Ct. R. 33.7.

In short this is not a case, as petitioner would have this Court believe, where the right to speak concerning public affairs, a right which is the essence of self-government, is at stake. Petitioner is not petitioning the government for a redress of grievances; he is not on the public stump criticizing the prudence of a piece of legislation; nor is he merely criticizing the judicial processing of attorney fees claims. What is at issue here is whether an attorney, after being twice requested by the Court to furnish information required by law—information which he had furnished the Court at least once before—can defiantly inform the Court that he will not obey or follow the law. This conduct should not and cannot be countenanced.

Petitioner contends that the clear-and-present-danger test formulated in *Bridges v. California*, 314 U.S. 252, 263, (1941) and in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978) is the standard by which his comments should be measured. A more proper and complete analysis for examining the validity of petitioner's suspension, however, revolves around the two-part test articulated in *Procunier v. Martinez*, 416 U.S. 396 (1974). That test examines 1) whether the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression; and 2) whether the limitation of first amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved. *Id.* at 413.

There can be no doubt that judicial institutions have a substantial interest in ensuring the legitimacy and in-

tegrity of the judicial process and in maintaining public esteem and confidence for the legal profession and legal institutions. As stated by this Court in *Wood v. Georgia*, 370 U.S. 375 (1962) "We start with the premise that the right of courts to conduct their business in an untrammelled way lies at the foundation of our system of government. . ." *Id.* at 383. Because lawyers are "officers of the court" with the special responsibility to protect the administration of justice, the courts have recognized the need for an imposition of some reasonable speech restrictions upon attorneys. *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982). "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and are historically 'officers of the Court.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). There can be no doubt that the substantial governmental interest in ensuring the legitimacy, fairness, and integrity of the judicial process is unrelated to the suppression of expression.

The crucial issue in this matter is not whether the disciplinary sanction of petitioner furthered a justifiable and significant interest unrelated to the suppression of speech (this cannot be denied), but rather, whether the Eighth Circuit went further than was necessary and essential to protect the undisputed governmental interest. The record reveals that the Eighth Circuit did not go further than what was necessary and essential under the circumstances.

The clear-and-present-danger test is but one way in which a court examines whether a restriction on speech is no greater than is necessary or essential to protect the governmental interest involved. *Procunier v. Martinez*, 416 U.S. 396, 407 (1974). Another standard utilized by

some courts in determining the constitutionality of speech by attorneys is whether there is a "reasonable likelihood" that such speech will prejudice the administration of justice. See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969), cert. denied, 396 U.S. 990. Under either standard it is apparent petitioner was not denied his right of free speech.⁴ The gravity and probability of the harm caused by plaintiff's disrespectful remarks is readily apparent. Courts need to exercise some control over attorneys and litigants in order to maintain judicial integrity and legitimacy. To hold otherwise would create judicial anarchy. In the instant matter, petitioner disrespectfully disobeyed what was tantamount to a court order and attempted to prevent the chief judge from carrying out his duties in administering the provisions of the Criminal Justice Act. This is precisely the type of conduct which this Court has intimated would justify a finding of criminal contempt. *Holt v. Virginia*, 381 U.S. 131, 136 (1965). *A fortiori*, this conduct is the proper subject of disciplinary sanctions. The request of the Court of Appeals that petitioner comply with the Criminal Justice Act guidelines is not a formal court order, but it deserves the same standing. This request was made as part of a judicial proceeding. The first amendment should not provide a cloak of protection for defiance and disrespect by a lawyer failing to comply with a court's request that he follow the law. What if attorneys defiantly refuse to follow the Federal Rules of Civil Pro-

4. There is no doubt that a lawyer cannot invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct. See *In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring). A majority of this Court in *Sawyer* also intimated that the clear-and-present-danger test is not applicable to a court's inherent power to discipline officers of the court for contumacious conduct. See *id.*

cedure, the Rules of the United States Supreme Court, or any other procedural rules that are necessary to help the Court function in a just and efficient manner? Petitioner would have this Court condone not only his conduct, but any conduct which would be disruptive of any court's procedures.

As an officer of the Court, an attorney is duty-bound to show respect for the law. How can the citizenry be expected to have public confidence in the legal system if one of the officers of the Court states in no uncertain terms that he will not follow or obey the law? This was not the first time that petitioner had represented indigent criminal defendants under the Criminal Justice Act. He had been appointed twelve previous times and had at least one previous case where he claimed fees in excess of \$1,000. (See Supplement to Appendix.) In that prior case, petitioner had no trouble complying with the applicable rules. Presumably, petitioner was well aware of the requirements of the Criminal Justice Act and its guidelines when he sought payment for his representation of Dennis Warren. Instead of submitting the proper documentation pursuant to the Court's request, he disrespectfully questioned the Court's authority to administer the requirements of the Criminal Justice Act and defiantly informed the Court that he was not going to comply. His comments certainly were not designed to better the administration of justice. Indeed, one can reasonably draw the inference that petitioner's conduct in not supplying the Court with the required information, when he had done so in the past, was a willful and intentional act on his part designed to challenge and interfere with the system of processing fee and expense claims under the Criminal Justice Act. Petitioner's comments strike at the very heart of the viability of the law. By flaunting his disrespect for the law and refusing

to comply with the applicable guidelines, petitioner has impeded the administration of justice in the case that he was serving as counsel.⁵ The Court of Appeals so found as a matter of fact. (J.A. 58.)

Finally, petitioner contends that his remarks in the October 6 letter further the important public interest of improving the judicial system and correcting its mistakes (J.A. 24), and that his letter is "the essence of self-government." (J.A. 36.) As stated above, petitioner was not suspended for his criticism of the judiciary. How can petitioner reasonably contend that his remarks to the Eighth Circuit that he is "extremely disgusted by the treatment of us by the Eighth Circuit" and that the Court "can take it or leave it" contribute to the marketplace of ideas on matters which concern the essence of self-government? He cannot. These remarks are not directed at the wisdom of a piece of legislation, nor do they pertain to the judicial system's capabilities to interpret and implement the rules and regulations promulgated under the Criminal Justice Act. Rather, the impact and effect of petitioner's remarks are clear: "I am not going to comply with the applicable legal guidelines, and your request that I do so is 'extremely disgusting.'"

Under these specific circumstances, the interests of judicial legitimacy and integrity as well as the public esteem for the legal system outweigh the extent to which

5. Congress has placed the responsibility on the chief judge of each circuit to approve claims for attorney compensation in excess of \$1,000 in order to ensure that the provisions of the Criminal Justice Act are administered in an efficient and proper manner. It is noteworthy that in fiscal 1984 the total expenditures under the Criminal Justice Act were \$40,665,000. (Summary Report of the Administrative Office relating to the Criminal Justice Act for fiscal year 1984). It is essential, therefore, that the chief judge of each circuit meticulously verify the hours and expenses on each claim.

free speech rights would be inhibited if petitioner's suspension were upheld. The free speech rights urged at some length by petitioner and the amici in their briefs would not be affected or deterred in the least.

B. Rule 46 of the Federal Rules of Appellate Procedure Is Constitutional.

The disciplinary procedures of all Circuit Courts of Appeal are embodied in Rule 46(c) of the Federal Rules of Appellate Procedure.⁶ Petitioner asserts that Rule 46(c), as applied to the facts of this case, is unconstitutionally overbroad and vague. (Petitioner's Brief 37.) This issue, although contemplated by petitioner's first question for review, was not addressed or argued in Petitioner's Return to Order to Show Cause (J.A. 23-31), in the Petition for Rehearing En Banc (J.A. 70-87) or in the Petition for Writ of Certiorari. In any event, his argument is without merit.

Petitioner contends that his "alleged 'disrespectful' comments are protected by the First Amendment due to the lack of a substantial countervailing interest." (Petitioner's Brief 39.) As demonstrated in part I, *A supra*, petitioner's disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act certainly interferes with substantial countervailing interests, namely, the legitimacy of the judicial process, the ability of a judicial officer to carry out his duties, and fostering public respect for the judiciary.

6. The Text of Rule 46(c) is as follows:

Disciplinary Power of the Court over Attorneys. A Court of Appeals may, after reasonable notice and an opportunity for hearing to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Petitioner's argument that Rule 46(c) is unconstitutionally vague is equally without merit. A statute is void for vagueness when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Rule 46(c) has withstood similar challenges that its terms are so vague that men of common intelligence must necessarily guess at its meanings. See *In re Bithoney*, 486 F.2d 319, 323-25 (1st Cir. 1973).

Petitioner, as a member of the North Dakota bar and as a licensed practitioner in both the Federal District Court and the Court of Appeals, is bound by the ethical canons of the legal profession. (J.A. 58.) Petitioner is presumed to know and abide by the ethical canons of the legal profession. It defies belief that petitioner can maintain that his disrespectful refusal to obey a court's request that he comply with the law is conduct for which he had no idea he could be disciplined. To state petitioner's contention is to demonstrate its absurdity.

II. PETITIONER'S DUE PROCESS RIGHTS WERE FULLY COMPLIED WITH BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Petitioner's due process claims are twofold: 1) that he was not apprised that his October 6 letter could be the basis of a disciplinary sanction and 2) that Chief Judge Lay erred in not recusing himself. Each argument is devoid of merit.

If, with due regard for the practicalities and peculiarities of the case, notice is given which serves to convey the required information, and affords a reasonable time for those interested to make their appearance, the constitutional requirements of due process are satisfied. See *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 314-15

(1950). The process due under the circumstances attendant in this case was met as petitioner was afforded notice of the charges and a hearing appropriate to the nature of the case.

On November 3, 1983, Chief Judge Lay wrote Judge Van Sickle, with copy to the petitioner, concerning petitioner's letter of October 6 to the district court's secretary. (J.A. 15-18.) In that letter, Chief Judge Lay states in pertinent part:

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. That demonstrates a total lack of respect for the legal process and the courts.

* * *

Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it.

* * *

(Emphasis added.)

On December 22, 1983, the Court filed an Order to Show Cause. (J.A. 21-23.) The Order indicates that Mr. Snyder has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorney fees. The Order further provides that in view of his refusal to carry out his obligations as a practicing lawyer and as an officer of this court, he is ordered to show cause as to why he should not be suspended from practicing in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit for such period of time as his refusal to serve continues. (Emphasis added.)

By virtue of the November 3, 1983, letter and the Order to Show Cause, petitioner clearly was put on notice that his letter of October 6 could form the basis for possible disciplinary action. How can petitioner, who expressed "extreme disgust" at his treatment by the Eighth Circuit and told the circuit to "take it or leave it," reasonably contend at this late date that he was surprised at the show cause hearing that the panel was concerned about his disrespectful comments in his October 6 letter? His "Return to Order to Show Cause" filed on January 16, 1984, confirms this beyond doubt. (J.A. 23-31.) Petitioner begins his "Argument" in that Return as follows: "The present proceeding was really initiated when the undersigned drafted and sent the letter of October 6, 1983. Had that letter not been sent, this proceeding would not be taking place." Petitioner's blatant and admittedly harsh remarks in that letter both questioned and criticized the Chief Judge's authority under the law to implement the provisions of the Criminal Justice Act. This was the very matter set forth in the Court's show cause order—a fact which petitioner concedes on page 40 of his brief.

Further, the record shows that on four occasions the Eighth Circuit gave Petitioner an opportunity to express his regret for his hasty conduct before acting to suspend him: 1) in Chief Judge Lay's letter of November 15, 1983 (J.A. 18-19); 2) during the course of the show cause hearing (J.A. 40, 45); 3) at the close of the show cause hearing (J.A. 50); and 4) in Chief Judge Lay's letter of February 24, 1984. (J.A. 53-54.) Petitioner elected not to do so. Petitioner was not disciplined because he failed to apologize; rather he was given the opportunity to apologize for his statements of disrespectful defiance in failing to comply with the Criminal Justice Act guidelines. At no time during this proceeding did petitioner raise a pro-

cedural due process issue; request a further hearing on his purported First Amendment rights; or request that he be given time to retain counsel. He was and remains steadfast in his position that he is going to do nothing about his disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act. Petitioner writes in his February 27 letter: "I cannot and will *never*, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms." (J.A. 54.) (Emphasis added.) In view of the petitioner's own position, his claims of procedural due process ring hollow. No material facts are at issue with respect to Mr. Snyder's conduct. In this particular setting, it would be an empty gesture to remand on due process grounds. *United States v. Lawson*, 600 F.2d 215, 218 (9th Cir. 1979).

Petitioner argues that Chief Judge Lay should have recused himself in consideration of this matter based upon the provisions of 28 U.S.C. §455.⁷ He first alleges that Chief Judge Lay prejudged this matter by writing his November 3 letter. The November 3 letter merely anticipates the substance of the Order to Show Cause which was filed six weeks later. Surely, petitioner cannot contend that a judge who issues a show cause order is thereby prevented from presiding at a subsequent show cause hearing.

Petitioner also complains that the Chief Judge had personal knowledge of the facts concerning the proceedings

7. 28 U.S.C. §455 provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

from his initial involvement before the issuance of the Order to Show Cause. The mere fact that a judge gains prior knowledge of the facts concerning the matter before him is not, in and of itself, sufficient to require the judge to disqualify himself. See *United States v. Covern*, 662 F.2d 162, 168 (2nd Cir. 1981), cert. denied, 456 U.S. 916 (1982); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). Furthermore, facts learned by a judge while acting in his judicial capacity can never be the basis for disqualification under 28 U.S.C. §455. *United States v. Patrick*, 542 F.2d at 390.

It is clear that the origin of the Chief Judge's personal knowledge of facts, as well as that of the other circuit judges, was gained solely as a judge in the matter before him. Because the alleged personal knowledge involved does not arise out of an extrajudicial source, the petitioner was not deprived of due process of law.

CONCLUSION

This is not a case of free speech involving criticism of a law or a court. This is a case where a lawyer was asked to comply with the law, but refused, stating that he was "extremely disgusted" that the Court would insist that he comply with the applicable legal guidelines. This is all this case is about. The Eighth Circuit has great difficulty with the proposition that any lawyer can assert that he is following his conscience which tells him to not only defy the Court's reasonable request that he comply with the law but to do so in a disrespectful manner. It seems incredulous that a lawyer can ask the highest court in the land to support his right to be disrespectful and to disobey the law.

The Eighth Circuit believes that this case does not present a substantial constitutional issue and respectfully requests that the writ of certiorari be dismissed as being improvidently granted. In the alternative, the Eighth Circuit respectfully submits that its judgment be affirmed.

Respectfully submitted,

ROSS H. SIDNEY

JOHN J. GREER*

PATRICK J. McNULTY

RICHARD J. BARRY

P. O. Box 10434

Professional Building

2222 Grand Avenue

Spencer, Iowa 51301

Des Moines, Iowa 50306

(712) 262-1150

(515) 245-4300

*Attorneys for the United States Court of Appeals
For the Eighth Circuit*

*Counsel of Record.

Dated this 29th day of March, 1985.